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No. 86-1040

In the Supreme Court of the United States

OCTOBER TERM, 1986

WELTON J. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WENDELL A. KJOS
Capt., JAGC, USN

J.S. UBERMAN
Maj., USMC

AARON SANTA ANNA
Lt., JAGC, USNR

Appellate Government Counsel
Appellate Government Division, NAMARA
United States Navy
Washington, D.C. 20374-2001

QUESTION PRESENTED

Whether there was probable cause to apprehend petitioner under Article 7(b) of the Uniform Code of Military Justice, 10 U.S.C. 807(b), for the murder of a fellow servicemember.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Brown v. *Illinois*, 422 U.S. 590 (1975) 11, 12
Dunaway v. *New York*, 442 U.S. 200 (1979) 7, 10, 11
Illinois v. *Gates*, 462 U.S. 213 (1983) 11
Mallory v. *United States*, 354 U.S. 449 (1957) 8
Rawlings v. *Kentucky*, 448 U.S. 98 (1980) 11, 12
Sibron v. *New York*, 392 U.S. 40 (1968) 9
Terry v. *Ohio*, 392 U.S. 1 (1968) 11
United States v. *Bazinet*, 462 F.2d 982 (8th Cir.), cert. denied, 409 U.S. 1010 (1972) 9
United States v. *Capers*, 685 F.2d 249 (8th Cir. 1982) 8, 9
United States v. *Clark*, 754 F.2d 789 (8th Cir. 1985) 8
United States v. *Di Re*, 332 U.S. 581 (1948) 7-8, 9, 10
United States v. *Fisher*, 702 F.2d 372 (2d Cir. 1983) 8, 9
United States v. *Fixen*, 780 F.2d 1434 (9th Cir. 1986) 11
United States v. *Howard*, 758 F.2d 1318 (9th Cir. 1985) .. 8
United States v. *Irurzun*, 631 F.2d 60 (5th Cir. 1980) 8
United States v. *Price*, 15 M.J. 628 (N.M.C.M.R. 1982), petition denied, 16 M.J. 156 (C.M.A. 1983) 2
United States v. *Sanford*, 12 M.J. 170 (C.M.A. 1981) 10
United States v. *Schneider*, 14 M.J. 189 (C.M.A. 1982) .. 7
United States v. *Sharpe*, 470 U.S. 675 (1985) 11
United States v. *Vaughn*, 718 F.2d 332 (9th Cir. 1983) ... 9
Wong Sun v. *United States*, 371 U.S. 471 (1963) 8
Ybarra v. *Illinois*, 444 U.S. 85 (1979) 9

Statute:

Uniform Code of Military Justice, 10 U.S.C. (& Supp. III) 801 *et seq.*:
Art. 31(b), 10 U.S.C. 831(b) 12
Art. 118, 10 U.S.C. 918 1

Miscellaneous: Page

1 W. LaFave, *Search & Seizure* (1978) 8

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 2a-17a) is reported at 22 M.J. 297. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 18a-26a) is reported at 17 M.J. 724.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1986, and a petition for rehearing was denied on October 29, 1986. The petition for a writ of certiorari was filed on December 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. Petitioner was sentenced to life imprisonment, a dishonorable discharge, forfeiture of all pay and

allowances, and reduction in rank to the lowest enlisted pay grade. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence (Pet. App. 28a-35a). On petitioner's appeal to the Court of Military Appeals, that court remanded the case to the court of military review for reconsideration in light of a recent Court of Military Appeals' decision (Pet. App. 27a). On remand, the court of military review again affirmed the findings and sentence (Pet. App. 18a-26a). When petitioner again appealed to the Court of Military Appeals, that court affirmed the findings and sentence (Pet. App. 2a-17a).[1]

1. This case concerns the stabbing murder of Yeoman Second Class Gary Smith during the early morning hours of July 19, 1980. At 2:26 a.m., Smith, who worked at the Naval Legal Service Office in Guam, approached the gate to the ship repair facility, a secure compound at the Guam Naval Station. Smith told the guard that he needed to return his passengers to their ship, the *USS Kinkaid*, which was docked at the ship repair facility on a brief port call. The guard noticed that there were two or three other men in the car, at least one of whom was black. He also detected the odor of marijuana in the car (Pet. App. 4a; Tr. 15-17). About three hours later, the guard discovered Smith's body at a distant part of the compound.[2] Smith had suffered numerous stab wounds to the neck, chest,

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[1] Petitioner's confederate, Gregory Price, was convicted of murder at a separate trial. *United States* v. *Price*, 15 M.J. 628 (N.M.C.M.R. 1982), petition denied, 16 M.J. 156 (C.M.A. 1983).

[2] Blood stains formed a trail approximately 100 yards long from a nearby building to the body. Smith's car was nearby. In it were two pairs of sunglasses, a "coke" spoon, and a substance that the investigator believed was marijuana. A pair of sunglasses (later identified as Smith's) was found near the place where Smith was originally

and back. A duty physician, relying on the temperature of Smith's body, estimated that his death occurred between 3:30 a.m. and 4:40 a.m.

Naval Investigative Service Special Agent Ernest Simon was contacted, and he immediately began to investigate Smith's death. His investigation focused on the crew of the *Kinkaid* because of Smith's remarks to the guard and because there were no other living or eating facilities at the ship repair facility. From interviewing the *Kinkaid's* crewmembers and examining its log, Agent Simon learned that 10 to 20 crewmembers had returned to the ship between 2:26 and 3:30 a.m. (Tr. 17-18, 74). Most of the black crewmembers returned together aboard a bus. Petitioner and another black sailor, Gregory Price, however, returned together at 3 a.m. after the main group had arrived (Pet. App. 5a; Tr. 17-30).[3] Agent Simon also learned that, after returning to the ship, Price had hurriedly changed clothes, borrowed a flashlight, ostensibly to look for his lost wallet, and then walked out of sight of the ship in the direction of the crime scene. Agent Simon knew that Price habitually wore sunglasses day and night, and Agent Simon believed that a pair of sunglasses found at the scene may have belonged to Price. Finally, Agent Simon learned that Price and petitioner were close friends (Pet. App. 5a; Tr. 23-26).

Agent Simon interviewed Price later that day. During the interview, Price stated that he and petitioner were constantly together from 10 p.m. the previous night until they returned to the ship by taxi after spending the evening in the nearby downtown area. According to Price, he and

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stabbed, and another pair (later identified as belonging to petitioner's confederate Gregory Price) was found along the trail of blood (Pet. App. 4a; Tr. 17-22).

[3] A taxi with passengers passed through the gate of the ship repair facility at about that time (Tr. 17-30).

petitioner did not immediately board the *Kinkaid* because they were intoxicated and the ship's rules forbade returning in that condition. To sober up, he said, they smoked some marijuana. Price maintained that he did not see petitioner after going aboard the *Kinkaid*. He denied ever having left sight of the ship when he went to look for his wallet, and he denied going in the direction of the crime scene. Price also said that he had lost his sunglasses two weeks before. Agent Simon concluded that Price had lied to him about several matters during the interview (Pet. App. 5a-8a; Tr. 25-30, 74).[4]

After interviewing Price, Agent Simon decided to speak with petitioner, because Agent Simon suspected that petitioner and Price were involved in Smith's murder. At that point, Agent Simon knew that petitioner and Price were the only two black members of the *Kinkaid* who did not have witnesses to account for their whereabouts during the relevant period (Tr. 27). To speak with petitioner, Agent Simon followed the procedure that had been coordinated with the commands of the *Kinkaid* and the Naval Station and that had been followed with regard to other witnesses from the ship. A shore patrolman went to the *Kinkaid*, where he was told by the duty master-at-arms that petitioner was on the naval station beach. After finding petitioner, the ship's duty master-at-arms summoned petitioner to his vehicle, checked petitioner's identification

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[4] For instance, Price could not explain how he lost his wallet, and his account of his and petitioner's whereabouts the night before was inconsistent with Agent Simon's estimate of the time that it would take to travel between the places that Price described. Price's account of his relationship with Smith conflicted with what Agent Simon had learned from another crewmember. Price also stated that he and petitioner returned that evening by taxi driven by a native Guamanian, but the log at the facility gate indicated that the driver appeared to be Chinese or Korean (Pet. App. 7a; Tr. 27-29).

card, and told him that he had to go to the Naval Investigative Service office. Petitioner accompanied the duty master-at-arms and the shore patrolman without complaint during the three-to-five minute drive to the office (Pet. App. 8a).

Petitioner sat in the waiting room for about ten minutes before Agent Simon escorted him into an interrogation room. Agent Simon advised petitioner of his *Miranda* rights and his right to terminate the interview at any time, and petitioner waived those rights in writing. Agent Simon advised petitioner that he was a suspect, but petitioner did not ask to speak with a lawyer, to stop the interview, or to leave, and he readily responded to Agent Simon's inquiries. At the end of the interview, petitioner consented in writing to a search of his shipboard locker (Tr. 44, AX 2).[5] Petitioner and Agent Simon, along with another agent who drove, left for the *Kinkaid* along with Price and a friend of theirs, both of whom were returning to the ship after their questioning. At the *Kinkaid*, petitioner identified the clothing he wore the night before. Agent Simon noticed what appeared to be blood stains on petitioner's jeans, and he seized the jeans for a laboratory analysis. After leaving petitioner with the *Kinkaid's* executive officer, Agent Simon returned to his office. Later that day, a laboratory analysis confirmed Agent Simon's suspicions, and he questioned petitioner again. This time, petitioner admitted that he had murdered Smith (Pet. App. 9a-10a; Tr. 46-57).

2. At a pretrial hearing, petitioner moved to suppress his statements and the trousers seized from his shipboard locker, on the ground that petitioner was apprehended

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[5] Before obtaining petitioner's consent, Agent Simon advised petitioner that he had the right to refuse consent, that he would suffer no penalty for refusing to give his consent, and that any incriminating evidence found during the search could be used against him (Tr. 43).

without probable cause at the time that Agent Simon first questioned him (Tr. 11; see AX 8-9). After an evidentiary hearing, the trial judge denied the motion (Tr. 91-92). He concluded that petitioner had been apprehended without probable cause, but he found that petitioner's statements were not tainted by the seizure (*ibid.*).[6]

3. The court of military review affirmed (Pet. App. 35a). The court did not decide whether Agent Simon had probable cause to apprehend petitioner (*id.* at 30a). Instead, it concluded that a serviceman can be ordered to report to military investigative authorities for questioning about a serious offense committed within a military enclave even when the authorities do not have probable

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[6] The trial judge explained his ruling as follows (Tr. 91-92):

> First; the * * * confession was voluntarily given. Second; I considered the accused's age, experience and demeanor during the time in question. Three; the accused was advised of his right to terminate the interview at any time as well as his counsel and Article 31 rights. Four; the accused was not placed in handcuffs nor was he harassed or intimidated. Five; the accused was not physically restrained or humiliated in any manner. Six; while the accused's detention had a quality of purposefulness[,] the manner in which the detention was effectuated was not calculated to cause surprise, fright or confusion. Seven; after * * * denying culpability the accused was released from NIS custod[y] and returned to his command. Eight; the accused freely and voluntarily consented to a search of his lockers on board ship. Nine; the discovery of human blood on the pants seized from the accused['s] locker together with all other information known by NIS provided probable cause to apprehend the accused. Ten; the confession was given after probable cause developed. Eleven; the accused's release from NIS custody, the permissive search and the discovery of human blood on the accused's pants were intervening events of significance. Twelve; while the accused was not free to go during the initial detention, that status came about solely because NIS intended to return him to his command at the conclusion of the interview. Thirteenth; [the] NIS Agents acted in good faith.

cause to believe that the serviceman has committed a crime (Pet. App. 31a-32a). The Court of Military Appeals vacated the judgment of the court of military review and remanded the case to that court for reconsideration in light of *United States* v. *Schneider*, 14 M.J. 189 (C.M.A. 1982), which held that *Dunaway* v. *New York*, 442 U.S. 200 (1979), applies to the military (Pet. App. 27a). On remand, the court of military review determined that petitioner had not been seized when he consented to the search of his locker (*id.* at 19a-23a). The court also concluded that, in any event, there was probable cause to apprehend petitioner at the time he spoke with Agent Simon (*id.* at 23a-26a).

4. The Court of Military Appeals affirmed (Pet. App. 2a-17a). Relying on *Dunaway* v. *New York, supra*, it concluded that petitioner had been apprehended at the time he first spoke with Agent Simon (Pet. App. 11a-15a). The court determined, however, that Agent Simon had probable cause to seize petitioner at that point, given the "combination of circumstances" in this case (*id.* at 16a). Accordingly, the court found that the petitioner's statements and his consent to the search of his locker were not the fruits of illegal conduct by Agent Simon (*id.* at 16a-17a).

ARGUMENT

Petitioner does not challenge the trial court's ruling that Agent Simon had probable cause to arrest him for Smith's murder once the agent discovered blood stains on his trousers. Rather, petitioner argues that he was arrested without probable cause when he was first taken to the Naval Investigative Service Office by Agent Simon. The conclusion that Agent Simon had probable cause at that point does not warrant review by this Court.

Probable cause cannot be based solely on a person's presence in the company of others believed to be involved in criminal activities. *United States* v. *Di Re*, 332 U.S. 581

(1948). But when presence is coupled with other incriminating evidence, it may justify the inference that a person is involved with others in criminal activities. See *United States* v. *Howard*, 758 F.2d 1318, 1319-1320 (9th Cir. 1985); *United States* v. *Clark*, 754 F.2d 789, 791 (8th Cir. 1985); *United States* v. *Fisher*, 702 F.2d 372, 376 (2d Cir. 1983); *United States* v. *Capers*, 685 F.2d 249, 251-252 (8th Cir. 1982); *United States* v. *Irurzun*, 631 F.2d 60, 62-63 (5th Cir. 1980); 1 W. LaFave, *Search & Seizure* § 3.6, at 659-661 (1978).

Petitioner contends the Court of Military Appeals relied on nothing more than his mere presence in Price's company on their return to the ship to justify his arrest. The court's opinion makes clear (Pet. App. 15a-16a), however, that it relied on several factors. At the time he first sought to question petitioner, Agent Simon knew that Smith had been murdered during the early morning hours at a remote, unoccupied area of the ship repair facility. He also had reason to believe that Smith's murderer was a member of the *Kinkaid* crew, that two or three crewmembers, at least one of whom was black, were passengers in Smith's car when he entered the ship repair facility, and that every black sailor except petitioner and Price had an alibi for the relevant period. Agent Simon had probable cause to believe that Price was involved in Smith's murder, and the nature of the crime suggested that it may well have been committed by more than one person.[7]

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[7] That last fact distinguishes this case from *Wong Sun* v. *United States*, 371 U.S. 471 (1963) (one person identified as heroin distributor), and *Mallory* v. *United States*, 354 U.S. 449 (1957) (rape by one assailant). In those cases, the police knew that only one person was responsible. By contrast, the multiple wounds to Smith's body and the violent nature of the assault suggested that Smith had been overpowered – which supported the inference that more than one person participated in the attack. Agent Simon therefore reasonably focused his suspicion upon both of the two remaining *Kinkaid* crewman who fit the description of a person with whom Smith was

The decision below does not, as petitioner argues (Pet. 7), conflict with this Court's decision in *United States* v. *Di Re, supra.*[8] Di Re was one of four people in a car when an informant told an undercover investigator that the driver had given the informant coupons that the investigator

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last seen before he was stabbed. Petitioner's fear (Pet. 7 n.1, 10-11 & n.4) that the decision below authorizes dragnet seizures of servicemen is therefore unfounded.

[8] *Sibron* v. *New York*, 392 U.S. 40 (1968), and *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), are also distinguishable. In *Sibron*, the defendant spoke with narcotics addicts over a period of hours; there was no visible criminal activity, and the officer did not know what the conversations were about. 392 U.S. at 62. In *Ybarra*, the defendant was present in a public tavern at a time when the police had probable cause to believe that the bartender possessed heroin; there was no reason to believe that the defendant was involved in or knew of any criminal activity. 444 U.S. at 90-91.

Petitioner also relies (Pet. 7) on several federal courts of appeals decisions, but the distinction between those cases and the decision below stems from differences in fact, not principle. In *United States* v. *Vaughan*, 718 F.2d 332 (9th Cir. 1983), the police had arrest warrants for two persons in the car in which the defendant was a passenger, but the police had no reason to suspect that the defendant was involved in or aware of any criminal activity (*id.* at 334). In *United States* v. *Fisher, supra*, the court found that the evidence would have justified the arrest of "virtually any Black male who, at lunchtime in a predominantly Black neighborhood, happened to come through a back-yard" on a particular local street, even if he was walking home (702 F.2d at 379). In *United States* v. *Bazinet*, 462 F.2d 982 (8th Cir.), cert. denied, 409 U.S. 1010 (1972), the police had probable cause to believe that a passenger in the car driven by Bazinet had stolen dynamite and that the dynamite was in a bag in the car in the passenger's possession. The court found that the police lacked probable cause to arrest Bazinet because no obviously criminal activity had occurred in his presence, the bag was not in his possession or control, and the meeting was not secretive or suspicious, but took place in broad daylight on a public street (*id.* at 989). Finally, in *United States* v. *Capers, supra*, the court found that the circumstances established probable cause for the arrest.

knew to be counterfeit. 332 U.S. at 583. This Court found that the investigator did not have probable cause to arrest Di Re for conspiracy to distribute counterfeit coupons. There was no evidence that Di Re was in the car when the coupons were passed to the driver or that he took part in any related conversation. Even if Di Re was present, there was no reason to infer that Di Re would have known that the coupons were counterfeit. *Id.* at 593. The circumstances of Di Re's presence also did not suggest that he was a participant in a crime: the "meeting [was] not secretive or in a suspicious hideout but in broad daylight, in plain sight of passers-by, in a public street of a large city" (*ibid.*). By contrast, Agent Simon had reason to believe that petitioner was present with another suspect during the early morning hours at a remote location of a military base when an extremely violent crime occurred. When these factors are considered as a whole, Agent Simon could reasonably have believed that petitioner was involved in some way in the crime.[9]

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[9] Even if Agent Simon did not have probable cause to believe that petitioner had committed the crime, he had at least a well-founded, reasonable suspicion that petitioner was involved, as well as probable cause to believe that petitioner knew about the events in question. In analyzing the reasonableness of the agent's actions, the differences between the military and the civilian communities must be considered. See *United States* v. *Sanford*, 12 M.J. 170, 173-174 (C.M.A. 1981) ("A service member is simply not free to ignore the lawful commands of his superiors [to report to a specified location]."). Petitioner could have been detained at the beach for questioning, and the additional intrusion of requiring him to go to the Naval Investigative Service Office for questioning was minimal. Because petitioner consented to the interview once he arrived at the NIS office, the brief period of his involuntary detention did not approach the level of intrusiveness that was involved in *Dunaway* v. *New York, supra*. Accordingly, even if Agent Simon did not have probable cause to arrest petitioner until after he discovered petitioner's blood-stained pants, the brief detention of petitioner for purposes of transporting him to the NIS office

Petitioner argues (Pet. 8, 11-12) that Agent Simon lacked a reasonable basis to believe that petitioner committed the murder, since petitioner had already returned to the ship prior to the time that Smith's death was estimated to have occurred.[10] But Smith had suffered numerous stab wounds and was found lying at the end of a trail of blood indicating that he had moved a considerable distance after being stabbed. Thus, it was reasonable for Agent Simon to believe that Smith's death was not instantaneous. The relevant inquiry, therefore, is whether petitioner was present when Smith was stabbed, not when he died. Moreover, the doctor's estimate that Smith died between 3:30 and 4:40 a.m. was based upon Smith's body temperature (not an autopsy) on a summer night in the tropics of Guam. In light of the other evidence known by Agent Simon, it was reasonable for him to infer (Tr. 17) that the estimate was not exact and to question the black sailors who may have been with Smith between 2:26 a.m., the time he was last seen alive, and 3 a.m., when the last black crewmembers returned to the *Kinkaid*.[11]

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was still reasonable under the rationale of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *United States* v. *Sharpe*, 470 U.S. 675 (1985).

[10] Petitioner also argues (Pet. 10) that Price's suspicious behavior in leaving the *Kinkaid* after 3 a.m. ostensibly to look for his wallet suggested that Price alone was responsible for the murder. Price's actions did not exculpate petitioner, however, and given the improbable alibi offered by Price for both petitioner and himself, Price's actions increased the suspicion as to both. The question is not whether it was more likely that Price was guilty of the murder than petitioner, but whether, under all of the circumstances, there was "fair probability" that petitioner was involved. See *Illinois* v. *Gates*, 462 U.S. 213, 231-232 (1983); see also *United States* v. *Fixen*, 780 F.2d 1434, 1436-1439 (9th Cir. 1986) (applying *Gates* to a warrantless arrest).

[11] In any event, the factors identified in *Rawlings* v. *Kentucky*, 448 U.S. 98, 107-110 (1980); *Dunaway* v. *New York*, 442 U.S. at 218; and *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), show that the trial court correctly found (Tr. 91-92) that petitioner's consent and his

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WENDELL A. KJOS
Capt., JAGC, USN

J.S. UBERMAN
Maj., USMC

AARON SANTA ANNA
Lt., JAGC, USNR
Appellate Government Counsel
Appellate Government Division, NAMARA
United States Navy

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later admissions were not tainted, even if he was unlawfully seized when first questioned by Agent Simon. First, petitioner was advised of his *Miranda* and Article 31(b) (10 U.S.C. 831(b)) rights at the outset of his initial interview, and he was told that he had the unqualified right to refuse consent to a search. Second, there were intervening circumstances between the initial interview, the search, and petitioner's later confessions. The search was completed at 5:25 p.m., and petitioner was not restrained by Agent Simon until the agent interviewed him and he confessed at 10:33 p.m. (Tr. 47; AX 3). Third, there was no deliberate or flagrant police misconduct. The trial court found (Tr. 91-92) that Agent Simon at all times acted in good faith; he followed NIS policy, which authorized the procedures used here (Tr. 59-61). See *Rawlings* v. *Kentucky*, 448 U.S. at 110; compare *Brown* v. *Illinois*, 422 U.S. at 605.

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